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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERTO FIERROS, Defendant and Appellant.	H034235 (Santa Clara County Super.Ct.No. CC787549)

A jury found Roberto Fierros guilty of offenses stemming from a sexual assault on a woman he talked with outside a bar and led away to a secluded location. He presents claims pertaining to a duplication he discerns in two of the five convictions and the trial court's refusal to instruct on the victim's intoxication.

We will affirm the judgment.

PROCEDURAL BACKGROUND

The jury convicted defendant of five criminal charges: assault with intent to commit a specified sex crime (Pen. Code, former § 220; Stats. 1979, ch. 944, § 3, p. 3253)[1], that sex crime being forcible sexual penetration (§ 289, subd. (a)(1)) (counts 1 and 5), false imprisonment (§§ 236, 237) (count 2), sexual battery of a restrained victim (§§ 242, 243.4, subd. (d)) (count 3), battery causing serious bodily injury (§§ 242, 243,

[1] All further statutory references are to the Penal Code.

subd. (d)) (count 4), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) (count 6). The original charge for count 1 had been of forcible sexual penetration (§ 289, subd. (a)(1)), but the jury found defendant not guilty of that offense and convicted him of the lesser included offense proscribed in former section 220.

The jury found true great bodily injury enhancements (§ 12022.7, subd. (a)) alleged on counts 1, 4, 5, and 6.

The court sentenced defendant to seven years in prison. It imposed the four-year midterm on the count 1 conviction and a consecutive three-year term for the great bodily injury enhancement found true on that count. It struck the punishment for the enhancements on counts 4 and 5 in the interests of justice (§ 1385, subd. (c)(1)) and stayed the sentences on the remaining counts and enhancements under section 654. It imposed fines and fees not at issue in this appeal.

FACTS

Both parties agreed that defendant had a sexual encounter with an intoxicated Danielle Doe after each left a bar where both had been present. They disputed only whether the encounter was consensual. The jury found against defendant on this question.

I. *Prosecution Case*

Danielle Doe testified that on the night of July 23-24, 2005, she was at a bar in San Jose. A man made contact with her as she was sitting outside smoking a cigarette. She caught him staring at her and his demeanor made her uncomfortable and scared. She was intoxicated. The man grabbed her arm and led her away. He drove her in a car to a dirt lot. She was on the ground with the man atop her, trying to remove her clothes, punching her, and telling her to be quiet. He pulled off her pants and made contact with her external genitalia with his hand, but she did not remember if he inserted any fingers in her vagina. He licked her breasts with his tongue. She was fighting him and

eventually managed to break free. The struggle went on without interruption. She ran down the street naked and obtained help at a nearby residence. There was nothing consensual about this event.

Doe could not identify defendant in court as her assailant. A police officer later testified that Doe could not identify defendant in a six-person photographic lineup either.

On cross-examination Danielle Doe adhered to her testimony. The assault was a continuous event and during it the assailant was "all over me, trying to lick me, just touch me as much as he could. He was trying to rape me." "He was touching me everywhere."

On redirect examination Danielle Doe testified that her assailant hit her "several times." She remained conscious throughout the attack, though she was dazed at times. She characterized herself as suffering, during the attack, "little blackouts from the alcohol or from being hit."

A sexual assault response team nurse examined Danielle Doe at the hospital within hours of the attack and observed that she had "significant injuries," including bruises and abrasions on her face and all over her body, swollen eyes and lips, marks on her neck, and injuries on her lower lip. She had redness in the vaginal area that was caused by some irritation or trauma. A radiologist and a medical resident discovered that Doe had a broken facial bone and a sinus injury.

The sexual assault response team nurse took swabs from Danielle Doe's nipples. These were later tested for deoxyribonucleic acid (DNA) and defendant's DNA was found on one of them.

A paramedic testified that as Danielle Doe was being transported to the hospital by ambulance she told her that after leaving the bar "the next thing she remembers was being in the bushes and someone hitting her and inserting their fingers in her."

A police officer who interviewed Danielle Doe at the hospital testified that she told him the assailant was hitting her in what she believed was an effort to have sex with her

and that he used his fingers to contact, or at least attempt to contact, her external genitalia.

On cross-examination, the officer testified that Danielle Doe told him that the assailant "was acting sexual as we were discussing the portion where she lost her clothing." The assailant, however, did not manage to penetrate her vagina with his fingers.

An audio recording containing excerpts from this interview was played in court. In a transcript of the excerpts, Danielle Doe told police that her assailant began by hitting her and throwing her against a fence. She would try to dissuade him by talking to him calmly but he would continue to attack. She attempted to escape at one point, but did not succeed in leaving, and he resumed attacking her, almost causing her to lose consciousness—"I tried to get away, and then he hit me again." She then described the assailant's groping at her vaginal area and stated that he did not penetrate her vagina. Then she again tried to escape, and succeeded this time.

Interviewed by police, defendant denied any involvement in the case. Shown pictures of Danielle Doe, he stated that he had never seen her before.

II. *Defense Case*

Defendant testified on his own behalf. On July 24, 2005, Danielle Doe and he were talking outside the bar in an empty parking lot. He was taking a smoking break and she was intoxicated. She allowed him to kiss her on the mouth, neck, and breast. The encounter lasted about five minutes, and afterward he went back inside and did not see her again. He did not assault her.

DISCUSSION

I. *Whether the Two Convictions of Former Section 220 Were Duplicative*

Defendant claims that his rights under state law have been violated by his subjection to two convictions for one crime. He maintains that he committed at most one violation of former section 220 but was convicted of that offense twice.

Defendant did not object when the trial court imposed sentence but the People do not assert that his claim is forfeited, and we will elect to consider it on the merits as a matter of discretion even if he failed to preserve it for review. The Supreme Court has reiterated that in most cases "an appellate court may review a forfeited claim—and '[w]hether or not it should do so is entrusted to its discretion.' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; cf. *id*., p. 888, fn. 7, 3d par. [appellate courts lack discretion to review otherwise forfeited claims regarding the admission or exclusion of evidence].)

Defendant is correct that a crime cannot be divided up piecemeal for the purpose of obtaining more than one conviction on its commission. "A single crime cannot be fragmented into more than one offense." (*People v. Rouser* (1997) 59 Cal.App.4th 1065, 1073.) " 'The state cannot split up one crime, and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime.' " (*People v. Stephens* (1889) 79 Cal. 428, 430.)

Conversely, however, an actor may commit the same crime more than once during the same course of sexually assaultive conduct. "[T]he Legislature has expressed no discernible objection to the steady increase in cases upholding multiple convictions based upon rapid, identical sex acts. For this and other reasons explained above, we find no support for defendant's contention that multiple, nonconsensual sex acts of an identical nature, committed in short succession against a single victim, constitute a single offense." (*People v. Harrison* (1989) 48 Cal.3d 321, 334.) Although, as defendant alludes to, *Harrison* addressed substantive sexual offense statutes and did not address former section 220, our Supreme Court later held more generally (see also *People v. Jimenez* (2002) 99 Cal.App.4th 450, 454-457) that "one offense is complete and another one begins whenever the perpetrator stops and resumes unlawful activity during a sexual assault." (*People v. Scott* (1994) 9 Cal.4th 331, 345.)

In this case, there was substantial evidence (*People v. Jimenez*, *supra*, 99 Cal.App.4th at p. 457) to sustain the two convictions of former section 220. The victim's

in-court testimony was brief and somewhat imprecise, pointed to a continuous assault and could be understood as suggesting that defendant inflicted an uninterrupted rain of blows, a sequence that might sustain only one conviction of former section 220. (See *People v. Stephens*, *supra*, 79 Cal. at p. 430; *People v. Rouser*, *supra*, 59 Cal.App.4th at p. 1073.) But other evidence shows two violations of former section 220. At the hospital, Danielle Doe told police that her assailant began by hitting her and throwing her against a fence. That was one violation of former section 220. She attempted to escape but did not succeed in leaving and he resumed attacking her. That was another violation of former section 220. She then described the assailant's groping at her vaginal area and stated that he did not penetrate her vagina. That was yet another violation of former section 220. That evidence constitutes substantial evidence that at least two violations of former section 220 occurred. Defendant's claim that he is being punished twice for one crime is without merit.

II. *Refusal to Instruct on Intoxication*

Defendant claims that the trial court erred under state law and infringed on his rights to due process, a jury trial, and a reliable guilt determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 15 and 16 of the California Constitution, when it refused to give an instruction that "would have pinpointed the effect of intoxication as a factor which the jury could consider in assessing witness credibility and weighing the evidence." The intoxication that defendant wanted to bring to the jury's attention was that of the victim, Danielle Doe, on the night she was attacked.

The instruction the defense sought would have supplemented CALCRIM No. 226, which the trial court did give the jury, with the following language, which the court declined to give:

"In determining the credibility of a witness you may consider his or her capacity to hear and see that about which he or she testified and his or her ability to perceive,

recollect or relate such matters; specifically in this regard, you may consider whether any witness was under the influence of alcohol or any other intoxicant and you may, but are not obliged to, disregard or give little weight to his or her testimony in so far as you find that his or her credibility has been impaired thereby."

As authority for his request, defendant cited to the trial court *People v. Barnett* (1976) 54 Cal.App.3d 1046. Indeed, he derived his proposed language from *Barnett*. (See *id*. at pp. 1050-1051, fn. 2.)

The trial court, which earlier had rejected two proposed pinpoint instructions that the prosecution had sought, was similarly unwilling to grant defendant's request for a pinpoint instruction on intoxication. It stated, "I believe that area is adequately covered in CALCRIM [No.] 226, and credibility of the witnesses, that being the first two factors that are stated, how well could the witness see, hear or otherwise perceive the things about which the witness testified, and how well was the witness able to remember and describe what happened."

At closing argument, defense counsel recommended that the jury consider whether Danielle Doe's intoxication had affected her ability to perceive events clearly.

We have not been able to locate any authority stating a standard of review of a trial court's refusal to grant a criminal defendant's request for a pinpoint jury instruction. We will review the trial court's determination de novo. (Cf. *People v. Cook* (2006) 39 Cal.4th 566, 596 ["We independently review a trial court's failure to instruct on a lesser included offense"].)

" '[A] defendant has a right to an instruction that pinpoints the theory of the defense . . . .' " (*People v. Roldan* (2005) 35 Cal.4th 646, 715, disapproved on different grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Nevertheless, the trial court's ruling was correct. " ' "[T]he general rule is that a trial court may refuse a proffered instruction if it . . . is argumentative, or is duplicative." [Citation.] "Although instructions pinpointing the theory of the defense might be appropriate, a defendant is not

entitled to instructions that simply recite facts favorable to him." ' " (*People v. Thornton* (2007) 41 Cal.4th 391, 467.) There is a "well settled rule against argumentative instructions on a disputed question of fact" (*People v. Wright* (1988) 45 Cal.3d 1126, 1137) and "a proper instruction" highlights " 'not specific evidence as such, but the *theory* of the defendant's case.' [Citation.]" (*Ibid.*) Defendant's proposed modification would have done more than pinpoint the theory of his defense and was argumentative. That is, it invited the jury to draw inferences favorable to him by highlighting an item of undisputed evidence, i.e., Danielle Doe's intoxication, and suggesting that the evidence weighed in his favor on the disputed question whether that intoxication rendered her account unreliable ("you may, but are not obliged to, disregard or give little weight to his or her testimony").

In *People v. Barnett*, *supra*, 54 Cal.App.3d 1046, the court held that the defendant's "proposed jury instruction on witness credibility should have been given. It correctly stated the law. Moreover, it pinpointed the intoxication issue, which was the basis of Barnett's attack on the credibility of the prosecuting witness, and informed the jurors of their options should they conclude the witness was intoxicated. The general standard instruction on witness credibility given by the court did not." (*Id.* at p. 1052.)

That last statement in *Barnett*, however, is not applicable to this case. The version of CALCRIM No. 226, a pattern instruction that was created long after *Barnett* was decided, fully apprised the jury of factors to consider in evaluating Danielle Doe's ability to perceive events. The instruction was complete and comprehensive.[2] Among its

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[2] The version of CALCRIM No. 226 given to the jury instructed it as follows:

"You alone, must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have, including any based on the witness's disability, gender, race, religion, ethnicity, sexual orientation, gender identity, age, national origin,

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or socioeconomic status. You may believe all, part, or none of any witness's testimony. Consider the testimony of each witness and decide how much of it you believe.

"In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony. Among the factors that you may consider are:

"[1.] How well could the witness see, hear, or otherwise perceive the things about which the witness testified?

"[2.] How well was the witness able to remember and describe what happened?

"[3.] What was the witness's behavior while testifying?

"[4.] Did the witness understand the questions and answer them directly?

"[5.] Was the witness's testimony influenced by a factor such as bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided?

"[6.] What was the witness's attitude about the case or about testifying?

"[7.] Did the witness make a statement in the past that is consistent or inconsistent with his or her testimony?

"[8.] How reasonable is the testimony when you consider all the other evidence in the case?

"[9.] Did other evidence prove or disprove any fact about which the witness testified?

"[10.] Has the witness been convicted of a felony?

"[11.] Has the witness engaged in other conduct that reflects on his or her believability?

"Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently.

"If you do not believe a witness's testimony that he or she no longer remembers something, that testimony is inconsistent with the witness's earlier statement on that subject.

"If you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest."

We quote the written version of the instruction. The trial court stated that it would give the jury copies of the written instructions for use during deliberations and the record offers no reason to doubt that it did so. In these circumstances (*People v. Wilson* (2008) 44 Cal.4th 758, 802) "[t]o the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*Id*. at p. 803; accord, *id*. at p. 804.)

admonitions to the jury are that the jury should take into account "How well could the witness see, hear, or otherwise perceive the things about which the witness testified?" "How well was the witness able to remember and describe what happened?" and "Has the witness engaged in other conduct that reflects on his or her believability?" To be sure, CALCRIM No. 226 nowhere mentions intoxication, but the notion that intoxication might impair a witness's perceptive abilities is part of the common knowledge of humankind, and failing to instruct the jury on that precise point did not impinge on defendant's interests.

Thus there was no error under state law in refusing defendant's requested pinpoint instruction. Nor is there any merit to defendant's constitutional claims: the refusal to insert a precise intoxication-based question about the victim's abilities to perceive by incorporating it into an instruction did not deprive defendant of a fair trial, trial by jury, or his right to a reliable determination of guilt.

DISPOSITION

The judgment is affirmed.

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Duffy, J.

WE CONCUR:

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Rushing, P. J.

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Premo, J.